In the Supreme Court of the United States

OCTOBER TERM, 1905.

HARRIET T. JAMES, ADMINISTRATRIX OF Charles P. James, deceased, appellant,
v.
THE UNITED STATES.

No. 215.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES, APPELLEE.

STATEMENT OF THE CASE.

1. The claim in this case is asserted under the provisions of section 714 of the Revised Statutes, which reads as follows:

> SEC. 714. When any judge of any court of the United States resigns his office, after having held his commission as such at least ten years, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

The material facts sufficiently appear in the pleadings and findings of fact set forth in the Record, pages 1–12.

2. Concisely stated for the purpose of argument, the ultimate facts are as follows:

On July 29, 1872, the late Charles P. James was duly appointed by the President an associate judge of the Supreme Court of the District of Columbia. It is provided by statute that the judges of that court shall hold their offices during "good behavior" and Judge James held his office until December 1, 1892. He then resigned from that office, and his resignation was duly accepted on the last-mentioned date. He had attained the age of over 70 years and had held his commission as an associate justice of that court continuously for more than ten years.

From the time of his appointment until June 30, 1891, he was paid a salary of $4,000 per annum. During the fiscal year from June 30, 1891, to June 30, 1892, under a provision in a general appropriation act for that year, he was paid a salary of $5,000 per annum. From June 30, 1892, to December 1 of the same year (the date of his resignation), he was paid the salary appropriated for his office for that year, at the rate of $4,000 per annum. From the date of his resignation until the date of his death he was paid a salary at the rate of $4,000 per annum.

This suit was instituted by the appellant, as administratrix of the estate of the late Judge James, to recover the sum of $1,000 per annum from the date of his resignation, December 1, 1892, until the date of his death, August 9, 1899, the total sum being $6,688.90.

3. Before entering upon an argument on the questions of law involved in this appeal, we respectfully cite for the convenience of the court the

following statutory provisions that affected the salaries of the chief justice and the five associate judges of the Supreme Court of the District of Columbia until recent years:

The act of March 3, 1863, chapter 91 (12 Stat., 762), which established the Supreme Court of the District of Columbia, fixed the salary of the four justices (one of whom was to be chief justice) at $3,000 each, "to be paid quarterly at the Treasury of the United States." It provided that "these justices shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold their offices during good behavior;" and that "each justice, before he enters on the duties of his office, shall take the oath prescribed to be taken by judges of the courts of the United States." [a]

The act of June 1, 1866 (14 Stat., 44, 45), fixed the compensation of the chief justice at $4,500 per annum, and of the "associate judges" at $4,000 each, "from and after the passage of this act."

The appropriation act for the fiscal year ending on June 30, 1892 (26 Stat., 908, 947), appropriated:

> For salary of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, at the rate of $5,000 per annum each, $30,000.

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[a] The act of June 21, 1870 (16 Stat., 160), added another associate justice to the court, who was to receive the same salary as the other associate justices; and the act of February 25, 1879 (20 Stat., 320), added another associate justice to the court, with the same salary as the other associate justices. Since then the Supreme Court of the District of Columbia has consisted of one chief justice and five associate justices, the latter sometimes called associate judges in appropriation acts.

The appropriation act for the fiscal year ending on June 30, 1893 (27 Stat., 183, 223), appropriated as follows:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, $24,500.

The sum so appropriated was the amount which had been fixed by law for the salaries of these six judges until the enactment of the first above-mentioned appropriation act for the fiscal year ending June 30, 1892.

During the fiscal year ending June 30, 1892, Judge James was paid a salary at the rate of $5,000 a year, as provided for in the appropriation act for that fiscal year.

The next succeeding fiscal year, ending on June 30, 1893, he was paid a salary at the rate of $4,000 a year, as appropriated for in the appropriation acts for that year; and as he resigned from the bench on December 1 of the same fiscal year, he was thereafter paid a salary at that rate until the time of his decease.

When Judge James resigned his office, as above stated, his successor was duly appointed to the vacant office, and was thereafter paid a salary at the same rate as that paid to the other associate justices of the court.

The act of February 9, 1893, which went into effect on April 3, 1893 (27 Stat., 434, 436), established a Court of Appeals in and for the District of Columbia, and provided that "the justices of the Supreme Court of the District of Columbia shall hereafter receive an

annual salary of $5,000 each, payable quarterly at the Treasury of the United States," and that one-half the salaries of the justices of both courts shall be paid out of the revenues of the District of Columbia; and Congress, by the act of March 3, 1893 (ib., 646, 653), appropriated $2,000 additional salary for the six judges of the Supreme Court of the District for the period from April 3, 1893, to July 1, 1893.

The appropriation act for the fiscal year ending June 30, 1894 (27 Stat., 675, 714), appropriated:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and the five associate judges, $30,500. One-half of the foregoing amounts * * * shall be paid from the revenues of the District of Columbia.

The enacting clause of the above-cited acts provided that the appropriations were made "in full compensation" for the service of the fiscal year; and the last section of each act repealed all acts or parts of acts inconsistent or in conflict with any of its provisions.

The appropriation act for the fiscal year ending on June 30, 1895 (28 Stat., 162, 204), also contained the like enacting clause and repealing section and appropriated:

> For salaries of the chief justice of the Supreme Court of the District of Columbia and of the five associate judges, at $5,000 each, $30,000, one-half of which shall be paid out of the revenues of the District of Columbia.

Thereafter the like appropriations were made annually for a number of years for the salaries of those judges in the same terms and amounts, with like enacting clauses and repealing sections.

The deficiency appropriation act of March 2, 1895 (28 Stat., 843, 851), contained the following provision:

> To pay the chief justice and five associate justices of the Supreme Court of the District of Columbia the difference between the rate of compensation received by them and five thousand dollars per annum for the fiscal year eighteen hundred and ninety-three, four thousand one hundred and fifty-five dollars and forty-seven cents, or so much thereof as may be necessary.

Pursuant to this appropriation Judge James was paid in April, 1895, the sum of $415.80 for that part of the fiscal year 1893 during which he held the commission of associate justice of the Supreme Court of the District of Columbia, and out of the remainder of the appropriation the chief justice and the other associate justices who held commissions during the whole of the year were paid sums which, when added to the salaries appropriated for them in the regular appropriation act for the fiscal year ending June 30, 1893, would amount to $5,000 for the chief justice and $5,000 for each associate justice who was in office when claimant's decedent resigned, and a proportionate amount was paid to his successor in office.

BRIEF AND ARGUMENT.

I.

The act of March 3, 1891 (26 Stats., 908), operated merely as a suspension, and not a repeal, of the act of June 1, 1866 (14 Stats., 44).

Upon this state of law and facts, it is contended by counsel for appellant that the act of 1891 operated to permanently increase the salaries of judges of the Supreme Court of the District of Columbia, and that said court, being a court of the United States, within the provisions of section 1, Article III of the Constitution, the salary of Judge James was permanently raised by the provision in said appropriation act to $5,000 per annum, and could not thereafter be diminished during his tenure of office.

If, as they contend, the act of March 3, 1891, operated to increase the salary of the judges of the Supreme Court of the District of Columbia to $5,000 per annum each, and repealed absolutely the general act of 1866, under which said judges were given a salary of $4,000 per annum, it is not apparent why the act of July 16, 1892, should not have the same repealing effect upon the act of 1891. The same repealing elements are present in the former as in the latter act.

In the case of *United States* v. *Langston* (118 U. S., 389) it was held that in the absence of any declaration in the act that the appropriation should be in full compensation for the service for the fiscal year for which such appropriation was made, such appro-

priation would not suspend the operations of a general statute; but where such a provision was present, as in the case of the *United States* v. *Fisher* (109 U. S., 143), the court will give it effect, and consider it as an express declaration of Congress that the sum appropriated shall be in full compensation for services and that no greater or less sum can be allowed. In the Fisher case the general law provided a salary of $3,000 per annum for the chief justice of the Territory of Wyoming, but by the appropriation acts of March 3, 1877 (19 Stats., 294), and June 19, 1878 (20 Stats., 178, 194), the sum of $2,600 was appropriated in each of said acts, and the acts contained the provision that it should be in full compensation for the service of the fiscal year.

Construing the effect that the provisions of the appropriation acts had upon the general law, this court said:

> Not only do the words of the statute make the intention of Congress manifest, but that intention is plainly repugnant to the former statute, which fixes the yearly salary of the chief justice at $3,000. It is impossible that both acts should stand. No ingenuity can reconcile them. The latter act must therefore prevail, and the earlier act must, *for the time covered by the appropriation acts above referred to, be considered as suspended.*

It would seem, then, that the provision in the appropriation act of 1891 operated merely as a suspension of the provisions of the act of 1866, and temporarily increased the compensation of Judge

James for the fiscal year ending June 30, 1892, to $5,000. The Court of Claims decided this case upon the theory advanced by this court in the Fisher case; that a provision of this character in a general appropriation act would not permanently repeal, but only suspend the operation of a general law repugnant thereto. In other words, that the provision in the act of 1891 was only intended to be operative during the succeeding fiscal year. There is nothing to indicate that it was the intention of Congress to make the provision in the appropriation act of 1891 permanent legislation, for Congress, realizing its error, corrected it in the act of 1892, returning to the form and policy followed in all appropriation acts between 1866 and 1891.

If the position taken by the Court of Claims is correct, and we contend that it is, the salary of the judge in question remained fixed at $4,000 per annum up until the date of his death, except for the fiscal year ending June 30, 1892, provided he was entitled to legally avail himself of the provisions of section 714, Revised Statutes.

We think this interpretation of the provision contained in the appropriation act of 1891 conclusively determines this case. However, if any doubt remains in the mind of the court, it is our further contention that the supreme court of the District of Columbia is not a court of the United States under the provisions of section 1, Article III, of the Constitution, and not being such a court, Judge James was not entitled to

avail himself of the provisions of section 714 of the Revised Statutes.

This brings us to a consideration of the constitutional question involved in this case.

II.

CONSTITUTIONAL QUESTION.

What is the political status of the District of Columbia [Territory of Columbia], its judicial courts and its inhabitants?

THE DISTRICT OF COLUMBIA IS A TERRITORY OF THE UNITED STATES.

1. The States of Maryland and Virginia ceded to the United States for a seat of Government certain parts of their territory, or counties, and those cessions were accepted by Congress. On July 16, 1790 (1 Stat., 130), Congress passed an act entitled, "An act establishing the temporary and permanent seat of the Government of the United States." The first section of that act declares:

> That a district or territory not exceeding ten miles square, to be located as hereafter directed on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue, be, and the same is hereby, accepted for the permanent seat of the government of the United States. *Provided nevertheless*, That the operation of the laws of the state within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, * * *. (See act of March 3, 1791, ch. 17, partly repealing the location of the new "territory.")

The same act directed the removal of the seat of Government to Philadelphia, and to so remain until the year 1800; and the last section provided that on the first Monday in December, in the year 1800, the seat of Government shall be transferred "to the district and place aforesaid."

We do not propose to rely upon an argument based upon nomenclature; but it will be observed that this act calls the seat of government of the United States "a district or territory."

THE COURTS OF THE DISTRICT OF COLUMBIA ARE TERRITORIAL COURTS, AND NOT UNITED STATES COURTS.

The act of February 27, 1801 (2 Stat., 103), seems to be the first that established a local judiciary for the District. In that act the Eighth Congress of the United States followed the precedent set by the old Confederate Congress on July 13, 1787, in the "Ordinance for the government of the territory of the United States northwest of the Ohio River" (Rev. Stat., p. 13). Section 4 of the ordinance prescribed that the commissions of the judges "shall continue in force during good behavior," and section 3 of the said act of February 27, 1801, prescribed that the Circuit Court and the judges thereof of the District of Columbia "shall have all the powers by law vested in the circuit courts and the judges of the circuit courts of the United States." This is exactly the same Federal jurisdiction and power that Congress has vested in all the corresponding courts and judges of all the other organized Territories. Moreover, the same section followed the precedent of the old

ordinance in that it prescribed in the same section 3, that the judges of the Circuit Court of the District of Columbia shall "hold their respective offices during good behavior." This legislation, instead of showing identity of courts, merely shows an assimilation of the jurisdiction, powers, and tenure of office of Territorial judges to those of the judges of "United States courts."

This act also created other judicial districts and courts in the States named therein and reorganized the United States judicial circuits, but it omits from any of the circuits "the District of Potomac." The previous judiciary act, entitled "An act to provide for the more convenient organization of the courts of the United States" (2 Stat., 89), had constituted from a part of the territory of the United States northwest of the Ohio River "the Indiana Territory" as a judicial district to be called the "District of Ohio," and its sixth section grouped all the judicial districts of the United States into six circuits, which included in the sixth "the District of Ohio." That district, it will be remembered, was then composed of the Northwest Territory and the Indiana Territory. Up to that time Congress, when legislating for the organization of the judicial department of the Government, seems to have regarded the courts in the Territories, including the District Court for the "District of Potomac" in the "Territory of Columbia," as component parts of the judicial system of the United States; but it must be admitted that the Sixth and previous Congresses were not as well informed as

later Congresses of the constitutional distinctions between organized Territories and the States of the Union. However, Chief Justice Marshall clearly drew the lines of distinction, in *American Insurance Co.* v. *Canter* (1 Pet., 511), between Territorial and United States courts, and they have never been redrawn nor obliterated up to the present day.

Speaking there of "the three distinct classes of cases" to which the judicial power of the United States extends, he said:

> The discrimination made between them in the Constitution is, we think, conclusive against their identity.

Applying the same language to "constitutional courts" and "legislative courts," we would say that the two distinct powers granted to Congress to ordain them "is conclusive against their identity." Anyone who supposes that the profound jurist considered "tenure of office" as a distinction and not merely as an illustration, does not, we think, understand his "opinion."

The principles argued and contested in this court in the "Insular Cases," to which we will refer later, were decided on those constitutional lines.

2. It may as well be unqualifiedly asserted here and distinctly borne in mind throughout the whole argument of this case that—

> *It has always been the plain intent of Congress, so far as practicable, to place the people of the District of Columbia and of the organized Territories on an equality in the enjoyment of*

judicial privileges with the people of the States of the Union in their respective judicial districts within those States. Therefore no argument based upon similarity or analogy of jurisdiction or judicial power can have the slightest bearing upon the question of constitutional law presented in this case.

NOMENCLATURE.

3. In the act of May 6, 1796 (1 Stat., 461), the city of Washington is mentioned as being "in the District of Columbia."

In the act of April 30, 1798, it is again mentioned as being "in the District of Columbia."

The act of February 13, 1801 (2 Stat., 89), entitled "An act to provide for the more convenient organization of the courts of the United States," which was repealed by the act of March 8, 1802 (2 Stat., 132), also names "the Territory of Columbia" and recognizes it as having been, before its cession, territory within the United States judicial districts of Maryland and Virginia, and establishes within "the Territory of Columbia" certain parts of the "District of Maryland" and the "District of Virginia." This act is clearly a general national judiciary act, and at first view its provisions seem to bear against our contention, viz, that none of the courts of the District of Columbia are constitutional courts within the meaning of Chief Justice Marshall's opinion in the leading case of *American Insurance Company* v. *Canter*, supra. Unquestionably this act was a federal judiciary act,

because it provides not only a new district court for the Territory of Columbia, but enacts that the—

> * * * new district shall be called the District of Potomac, and a district court in and for the same shall be holden at Alexandria by the district judge of the District of Maryland on the first Tuesday in April and the first Tuesday in October in each and every year.

The act of February 27, 1801 (2 Stat., 103), is indexed in that volume as "An act concerning the District of Columbia."

The act of March 3, 1801 (2 Stat., 115), is entitled "An act supplementary to the act entitled 'An act concerning the District of Columbia.'"

In the act of May 1, 1802 (2 Stat., 175), we find the city of Washington as being in "the permanent seat of the Government of the United States."

The same nomenclature, "District of Columbia," appears on pages 193 and 195 of the same volume.

The act of March 3, 1803 (2 Stat., 227), is entit ed "An act concerning the insurance of buildings, goods, and furniture in the county of Alexandria, in the Territory of Columbia."

In the act of February 24, 1804 (2 Stat., 254), we find the seat of Government designated as the "District of Columbia."

On page 259 of the same volume we find legislation for the inhabitants "residing within the territory ceded to the United States by the treaty of April 30, 1803, between the United States and the French Republic" as being inhabitants of the "District of Orleans."

In the act of March 26, 1804, we find the "District of Orleans" erected into two Territories, i. e., Mississippi and Louisiana, the latter called the "Territory of Orleans" (2 Stat., 283).

In the act of March 2, 1805, mention is made of the Territory of Orleans (2 Stat., 324).

We make the above citations merely to show that the seat of Government was first designated as the Territory of Columbia, and that afterwards its nomenclature was changed to the title "District of Columbia."

As late as the year 1840 we find this Court, speaking by Mr. Justice Catron, saying that the counties of Alexandria and Washington "constitute the territory of Columbia and are united under one territorial government" (Bank of Alexandria *v.* Dyer, 14 Pet., 146). Indeed, as late as January, 1891, we find this court classing the District of Columbia with the organized Territories of the United States in all its illustrations of the distinctions of status between States and Territories. (*Downs* v. *Bidwell*, 182 U. S., 244.)

4. But, as was said before, nomenclature is not argument, and whether we *call* the seat of government a District or a Territory is not material to the present question. Unquestionably the present seat of government was ceded to the United States by the State of Maryland, and it has been treated by Congress and by the United States courts as a Territory acquired under the Constitution (Art. I, sec. 8, cl. 17) and has

been governed as a Territory by Congress under that clause and under clause 2, section 3, Article IV. The moment the seat of government was established here the former inhabitants of that part of the State of Maryland at once lost their political status as citizens of the State of Maryland and had only the political status of inhabitants of a Territory (*Georgetown* v. *Alexander Canal Co.*, 12 Pet., 96). Thereafter they could only become possessed of their former political rights by emigrating to Maryland or to some other State of the Union; and the District itself could not again become a State, or part of a State, of the Union even if Congress should so desire. (Art. IV, sec. 3, cl. 1.) It is not necessary to enumerate the political rights which the inhabitants of the District of Columbia can not exercise in this District. We may be allowed to refer to a few of them, for example: They can not elect a Senator or Representative for the District to Congress; they can not vote for an elector for the President or Vice-President in this District; they can not elect a local government for the District. They are *governed* by Congress. Their political status is only Territorial, and it is limited to a greater extent than the status of the inhabitants of any other organized Territory of the United States. In the other Territories Congress allows the inhabitants a republican form of government, consisting of three departments—the legislative, executive, and judicial. Here we have neither of these departments now. The inhabitants of the

District of Columbia are governed by Congress directly through an executive department and a judicial department appointed by the President as prescribed by law, and Congress alone legislates for the District.

Of course, the Constitution extends over the District of Columbia as much as over any other organized Territory, and of course Congress has the power to prescribe the tenure of office of the judges of the courts of the District of Columbia to the same extent that it can prescribe tenure of office, *subject to the pleasure of the President*, in any other organized Territory. Nevertheless, relying upon Chief Justice Marshall's opinion, we deny the power of Congress to establish a judicial court of the United States in and for the District of Columbia. Per Thompson, J., in *Livingston* vs. *Story* (9 Pet., 656):

> That Congress has the power to establish circuit and district courts in any and all the States * * * * can not admit of a doubt,

and Congress has not the power to establish a United States court in a Territory.

In *Shoemaker* v. *The United States* (147 U. S., 282, 300), Mr. Justice Shiras, answering a contention of counsel, said as follows:

> But this contention can scarcely have been seriously made in view of the explicit language of the Maryland act in its second section: "That all that part of said Territory called Columbia which lies within the limits of this State shall be, and the same is hereby, ac-

> knowledged to be forever ceded and relinquished to the Congress and Government of the United States in full and absolute right and exclusive jurisdiction, as well of soil as of persons residing or to reside thereon, pursuant to the tenor and effect of the eighth section of the first article of the Constitution of Government of the United States." (*Mattingly* v. *District of Columbia*, 97 U. S., 687, 690; *Gibbons* v. *District of Columbia*, 116 U. S., 404.)

Here we find in the said Maryland act perhaps the origin of the phrase "Territory called Columbia."

No inhabitant of the District of Columbia or other Territory can maintain a suit in a United States Circuit Court against a citizen of any State of the Union, although every citizen of a State has that constitutional right.

> *Hepburn* v. *Ellzey*, 2 Cr., 444;
> *Reily* v. *Lamar*, ib., 344;
> *Fenwick* v. *Sear's administrators*, 1 Cr., 259.
> *New Orleans* v. *Winter*, 1 Wheat., 91.

5. The fact that Congress has prescribed that the judges of the Supreme Court of the District of Columbia and of the Court of Appeals of the District shall be appointed by the President and hold their offices "during good behavior" is evidence that Congress did not regard the judges of those courts as judges of a United States Court. No doubt Congress was following an old precedent derived from Maryland:

> That the chancellor, all judges, the Attorney-General, clerks of the General Court, clerks of the county courts, the registrar of the land

> office, the registrars of wills shall hold their commissions during good behaviour, removable only for misbehaviour on conviction in a court of law (State Const. of 1776, Art. XL; Bill of Rights, Art. 30. Const. of 1851. See also Mass. Const. of 1780, Chap. III, Art. 1).
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> "All judicial officers duly appointed * * * shall hold their offices during good behaviour."

The necessary inference from their statutory tenure of office is that the Judges of the District of Columbia are not United States Judges. The tenure of office of the United States Judges is never referred to in any law of Congress, because their tenure is granted by the Constitution itself, and Congress seldom, if ever, enacts unnecessary legislation. This is not the only legislative grant to judges of tenure of office "during good behavior." The judges of the territory of the United States northwest of the river Ohio were appointed by the Congress of the Confederation, and the Ordinance prescribed that: "Their commissions shall continue in force during good behavior." (1 Stat., 51.) At one time the judge or judges of the Territory of Michigan were appointed to hold their offices "during good behavior." (5 Stat., 13.) That Territory was carved out of "the territory of the United States northwest of the river Ohio" by the act of January 11, 1805, and its third section continued that judicial tenure of office. (2 Stat., 349.) We do not for a moment contend that the Congress could not provide, as they have done, that the judges of the courts for the District of Columbia should hold their offices "during good behavior." We think, with the

court below, that it was the intention of the framers of the Constitution that the people at the seat of government should have a permanent government, and that their local courts should be a part of their government. The Congress evidently so construed the Constitution when they granted tenure of office during good behavior to the judges of the Supreme Court of the District and the judges of the Court of Appeals. We may be allowed to add that perhaps similar tenure of office might be properly granted to the principal officers of the executive branch of the District government.

In *Downes* v. *Bidwell*, 182 U. S., 244, 259, Mr. Justice Brown said of *New Orleans* v. *Winter* that in that case "an attempt was made to distinguish a territory from the District of Columbia." Evidently the attempt was a failure, as it will be here.

THE COURTS OF THE DISTRICT OF COLUMBIA ARE TERRITORIAL COURTS, NOT UNITED STATES COURTS.

We know that in *Embry* v. *Palmer* (107 U. S., 3, 10), Mr. Justice Matthews, delivering the opinion of this court, said: "That he Supreme Court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress." The language quoted is not a decision that those courts are "courts of the United States" within Chief Justice Marshall's definition of "constitutional courts." On the contrary, the langauge rather favors our contention.

Was Judge James a judge of a court of the United States, within the meaning of section 714 of the Revised Statutes of the United States?

We are not aware that section 714 of the Revised Statutes has ever been interpreted or construed by any judicial court. Nor are we aware that the political status of the courts of the District of Columbia has ever been directly judicially decided. The case of *United States* v. *Dana et al.* (Fed. Rep., vol. 68, p. 886), which originated in the United States District Court for the Southern District of New York, comes nearer to deciding the principle of the judicial distinction between the courts of the District of Columbia and the courts of the United States than any other recent decision that we know of. The question in that case arose under section 1014 of the Revised Statutes of the United States, and the decision created considerable interest in the District of Columbia. Mr. Dana, editor of the New York Sun, had been indicted in the Supreme Court of the District of Columbia. Commissioner Shields had held him under that section on an application made to the New York district judge for an order removing the prisoner to Washington for trial in the Supreme Court of the District of Columbia. The question was elaborately argued by able counsel on both sides, among them the present distinguished Secretary of State, Mr. Elihu Root, and the late Jeremiah Wilson, who was then one of the leading members of the District of Columbia bar. Delivering his opinion, District Judge Brown incidentally reviewed the statutory jurisdic-

tion of the Supreme Court of the District of Columbia. He said:

> It is plain, however, that the judiciary act did not contemplate any such local offenses as libel in the District of Columbia. In the Federal system there are no common-law crimes.

And he cited the case of *United States* v. *Hudson* (7 Cr., 32) and quoted from the opinion of Mr. Justice Johnson in *United States* v. *Coolidge* (1 Wheat., 415), as follows:

> The legislative authority of the Union must first make an act a crime, affix a punishment, and declare the court that shall have jurisdiction of the offense.

And held that—

> There has never been any statute either of the United States or of the State of Maryland making libel a criminal offense, or defining its punishment. The present indictment rests wholly upon the old common law of Maryland and upon the act of Congress of February 27, 1801 (2 Stats., 104), accepting the session of that district, and providing that "the laws of Maryland as they now exist shall be and continue in force," except as modified, etc.
>
> Assuming, though that point also is disputed, that libel in the District of Columbia is a criminal offense, it is nevertheless a purely local offense. It is no part of the Federal system of laws, nor related to the general legislation of Congress. In administering the local law of the District of Columbia the National Government there acts as the State govern-

ments act within their several limits in administering the ordinary rights of person and property. That is an exceptional and a wholly different field of action from what is embraced in ordinary Federal legislation, and it was evidently wholly foreign to the scope of the judiciary act. Offenses against the local law of the District of Columbia are, in a sense, offenses against the United States, becausethe United States is the local governing authority. * * * But the judiciary act was not dealing with or contemplating this exceptional and local relation. The District of Columbia had then no existence. The scope and aim of the judiciary act were manifestly purely Federal and national. It created the Federal courts authorized by the Constitution for the country at large; it defined their jurisdiction, civil and criminal; and it established the districts in which each might act. * * * What offenses are referred to? Manifestly those Federal offenses only of which the courts thereby created had jurisdiction; offenses which those courts were designed to try and could try; since the only subject of consideration was the national Federal courts, and trials in those courts alone. Those offenses were Federal offenses arising under Federal statutes applicable throughout the country.

* * * * *

At that time a Territorial government and Territorial courts had been organized under the ordinance of 1787 in the Northwest Territory. But no one would contend that mere local offenses committed in that Territory

and not embraced in any general legislation of Congress were removable "offenses" under the judiciary act any more than that its Territorial courts were "courts of the United States" in the sense of a judiciary act or of ordinary legislation. When the District of Columbia was afterwards acquired its courts and local offenses under the local law alone were in the same category as those of the Territories. That none of those courts were "courts of the United States," in the sense of ordinary legislation, has been long adjudicated, because they do not belong to the Federal system, and are not courts of the Constitution, nor created under the judicial power, but under a separate authority in the Constitution to make "all needful rules and regulations for the Territories." * * * (*Insurance Company* v. *Canter*, 1 Pet., 511, 546; *Clinton* v. *Englebrecht*, 13 Wall., 447; *Hornbuckle* v. *Toombs*, 18 Wall., 648, 655; *McAllister* v. *United States*, 141 U. S., 182, 184; 11 Sup. Ct., 949.) There is the same distinction between local and Federal offenses.

This case perhaps practically decides that the Supreme Court of the District of Columbia is not a "court of the United States" under section 714 of the Revised Statutes, and that that section does not include judges of the courts of the District of Columbia. We infer from District Judge Brown's closing remarks that he would have regarded any *construction* of section 1014 of the Revised Statutes of the United States that would include courts of the District of Columbia and judges thereof as United States courts

and judges as *judicial legislation*. He says, on page 904 of the Federal Reporter, referring to the report of the distinguished Senate Judiciary Committee, partially printed on page 902:

> Meantime, it is not for this court to anticipate or presume upon the intent of Congress on that subject, or to attempt to supply any supposed defects in the statutes by wrenching them from the true meaning and intent with which they were enacted; least of all when doing so would introduce a new class of removals in favor of the District of Columbia alone, while similar removals are denied, under the Constitution and laws, to every other district and State in the country.

And if the extradition had been applied for to any other Territory of the United States, it would have added after the word "State" the words "and Territory." However this may be, the question of such extradition is settled by this court in *Benson* v. *Henkel* (198 U. S., 1).

Our contention in the case at bar necessarily is that section 714 of the Revised Statutes must be regarded as an amendment to a judiciary act, "that the scope and aim of that section is manifestly purely Federal and national" and has no relation whatever to the courts and judges of the District of Columbia, and that to construe its provisions so as to include those courts and judges would be *judicial legislation*.

There is a very able official report to which we would like to refer the honorable court that, in a few words, substantially disposes of the distinction be-

tween the United States courts and the courts of the "Territories and the District of Columbia." It is the report of a very distinguished Attorney-General—Hon. Caleb Cushing. It is one of our State Papers. On February 4, 1854, President Pierce sent it to the House of Representatives with a letter addressed to the Speaker, dated March 1, 1854, which reads as follows:

> I transmit, herewith, a report of the Attorney-General, in answer to the resolutions of the House on the 22d of December, requesting me to communicate to the House the plan for the modification and enlargement of the judicial system of the United States, recommended in my annual message to Congress.

The report is printed as an Executive Document. (H. R. No. 73, Thirty-third Congress, first session.)

In the last paragraph of his report, Attorney-General Cushing said:

> I have abstained from remarks as to the courts of the Territories and of the District of Columbia, which are established under other clauses of the Constitution than those herein considered, and which are not presumed to be within the purview of the resolutions of the two houses. It may, however, be not improper to say here, that the legal condition of the District of Columbia, still regulated by the laws of Maryland as they stood half a century ago without material legislative improvement during that period of time, and with recognized defects in its organization, calls loudly for some action on the part of Congress.

Except the paragraph last above quoted, the whole report relates exclusively to "the judicial system of the United States," and its great author did not "presume" to consider the joint resolution as extending to the District of Columbia or any of the Territories.

The judicial system above referred to was then well understood to consist solely of the Supreme Court of the United States, its Chief Justice, and the Associate Justices, the United States district courts, and the United States circuit courts in the several States, and the judges of those Federal courts. Hence, it is well understood by all judicial courts, and by all lawyers that all the legislation of Congress in the several judiciary acts is intended only for "courts of the United States" and the judges of those courts; and especially is it so in regard to provisions for their salaries; hence, section 714 of the Revised Statutes relates exclusively to the courts and judges above enumerated.

It is, therefore, not difficult to correctly interpret the provisions of that section upon which the claim at bar is erroneously asserted. Indeed, we think it would be impossible for any judicial mind to strain its words so as to include the courts and judges of the courts of the District of Columbia, or the courts established by Congress in any of the organized Territories. Indeed the court below has clearly not attempted to do so.

THE LEGISLATIVE HISTORY OF SECTION 714 OF THE REVISED STATUTES.

It may be a little interesting to trace the "history of the legislation" contained in that section. To do this properly, we may begin by saying that section 714 of the Revised Statutes was enacted from section 5 of the judiciary act of April 10, 1869. (16 Stats., 44, 45.) It had been originally offered by Senator Drake, of Missouri, as an amendment to a former bill [Senate bill No. 784; Cong. Globe, Index, p. xl, vol. 85] entitled "A bill to amend the judiciary system of the United States," which had been introduced by Senator Trumbull.

That bill was duly referred to the Judiciary Committee of the Senate (p. 414), reported back with an amendment (p. 813), and discussed in the Senate (pp. 1366, 1367, 1407, 1483–1489). Senator Drake (afterwards Chief Justice of the Court of Claims) offered an amendment (p. 1488), which reads as follows:

> *And be it further enacted*, That any judge of any court of the United States who shall, after having attained the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

Senator Grimes asked him whether the amendment would embrace "the judges of the new circuit system and the judges of the district courts." He answered that—"they are embraced in it. The language is: 'Any judge of any court of the United States.'"

Senator Grimes replied: "If we are going to establish a civil pension list, why should we not embrace marshals, district attorneys, and clerks?"

As the real purpose of the proposed bill was to relieve the strain upon the mentally and physically vigorous judges of the United States courts of having to perform the judicial functions of superannuated judges, the amendment was conclusively shown as being the only one that could constitutionally relieve the physically vigorous judges from the strain of having to perform the judicial functions of the superannuated judges, and that it could not be regarded as in any sense inaugurating a civil pension list. Nevertheless, as the bill was an exceedingly important one, the Senators were constrained to reject the proposed amendment. It was feared that the bill might not become a law, as the relations between the President and the Congress were not at that time congenial; therefore that bill did not receive the President's approval. This court has already taken judicial notice of that unfortunate historical incident. (See *Parsons* v. *United States*, 163 U. S., 324.) Practically the same bill was introduced in the Senate by Senator Trumbull, on March 8, 1869, and referred to the Committee on the Judiciary. (It was Senate bill No. 44, Forty-first Congress, first session; Congressional Globe, vol. 87, p. 29.) The bill was reported back by Mr. Trumbull with an amendment (ib., 62). On March 17, 1869, he asked to have an amendment appended to the bill. On March 22,

1869, on his motion, the Senate proceeded to consideration of the bill (ib., 192). Senator Trumbull thought it was only necessary to read the amendment of the committee, and the chief clerk read the amendment (ib.,), including the amendment and the committee's amendment, which Senator Drake desired to offer. The bill was discussed in the Senate (ib., 192, 207–217, 219). In the same Congress another judiciary bill (House bill No. 10) was pending, which Representative Bingham, by instructions of his committee, reported for a substitute, of which sections 5 and 6 provided for the *retirement* of judges of the courts of the United States in the following language (ib., 337):

> SEC. 5. *And be it further enacted,* That any judge of any court of the United States who is now seventy years of age, and that any judge thereof who shall hereafter become seventy years of age, and who shall have served at least ten years as such judge, may, upon his filing with the President a certificate of that fact, be excused and retired from active service as such judge; and thereafter he shall, during the time he shall continue to hold said office, be entitled to receive from the United States the same salary that he was by law entitled to at the time of filing his certificate: *Provided,* That if any judge who shall have attained the aforesaid age shall be incompetent, by reason of disease or infirmity, to make and file such certificate, the facts of his age and incompetency may be proved by

> satisfactory evidence before any judge of the Supreme Court; and upon such justice filing his certificate of such facts with the President the said judge shall thereupon be excused and retired with like effect as upon his own certificate.

On April 1, 1869, Senator Trumbull, from the Committee of the Judiciary, to whom were referred the amendments of the House of Representatives to the said Senate bill No. 44, reported it with an amendment (ib. 439). On April 7, 1869, Senator Trumbull moved that the Senate proceed to the consideration of the amendment of the House, to which the Senate Committee on the Judiciary had proposed amendments (ib. 574), and the Chief Clerk "read the amendment of the House as amended, which was to strike out all of the original bill after the enacting clause, and to insert in lieu thereof the following:"

[It is not necessary here to quote anything except section 5, on page 575, which reads as follows]:

> SEC. 5. *And be it further enacted*, That any judge of any court of the United States who shall, after attaining the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

It seems that the House amendment did not contain the section above quoted, and that that section was added by the Senate Committee on the Judiciary (ib. 574). It was then considered as a provision

for "retiring judges when they arrived at 70 years of age" (ib. 650); and "the amendment, as amended, was concurred in" (ib. 576). April 8, 1869, the House agreed to the amendments of the Senate to the amendment of the House (ib. 630, 646–647, 649, 650). On page 650 it appears that Mr. Schenck offered the following amendment to the amendments of the Senate:

> In section 5, after the word "who," insert "having held his commission as such at least ten years;" so that it will read:
>
> That any judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.

And the proposed amendment was then adopted. On the next day (April 9) the Senate "agreed to the amendment of the House to the amendments of the Senate to the amendment of the House to Senate bill No. 44." The bill became a law on April 10, 1869, and said section 5 was reenacted on June 22, 1874, as section 714 of the Revised Statutes of the United States, in substantially the same words in which it was enacted as section 5 of the act of April 10, 1869 (16 Stats., 45).

This amendment of Senate bill No. 44, entitled "A bill to amend the judicial system of the United

States," offered a way out of the most perplexing dilemma that any Congress has ever had to confront. It seems that throughout the debates on the two judiciary bills the problem of relieving the courts and judges of the United States from the strain of superannuated judges was insoluble, until at last the idea of voluntary resignation pointed the only way out of the dilemma with masterful manifestation in the words of that section.

Nothing that at this day could be argued pro or con could impress upon this court the idea that section 714 of the Revised Statutes could be construed so as to include the judges of any courts that are not constitutional courts as defined by Chief Justice Marshall in distinction from legislative courts and judges. Of the latter class Congress has established great numbers, including many in this District; for instance, the Court of Appeals of the District of Columbia, the Supreme Court of the District of Columbia, the Orphans' Court, the police courts, the justices of the peace, and from time to time we have "commissions" sitting here clothed by Congress with judicial functions. Certainly if any of these "courts" or commissions is a constitutional court under Article III, section 1, of the Constitution, all of them are such courts, and if this case should be decided in favor of the appellant it would become (what we consider impossible) a precedent for similar suits.

SUMMARY.

We insist that:

First. The District of Columbia is the seat of government of the United States. (Const., Art. IV, sec. 3, cl. 2; also Art. I, sec. 8, cl. 17.)

Second. The District of Columbia is a permanently organized Territory of the United States.

Third. The framers of the Constitution intended that the Congress, the President, and the Supreme Court should perform their respective functions at the seat of government.

Fourth. The political status of the District of Columbia, its judicial courts and judges, and domiciled inhabitants, is Territorial in every sense, and is not distinguishable, constitutionally, from the status of the people and the corresponding courts and judges in the other Territories of the United States.

Fifth. The Congress has no constitutional power to establish a District or Circuit Court of the United States in and for the seat of government, nor in and for any other organized Territory of the United States.

Sixth. The courts established for the people of the District of Columbia have jurisdiction and judicial powers assimilated as nearly as practicable to the jurisdiction and judicial powers of the United States courts in the States of the Union, and also much larger jurisdiction than Congress can confer upon any court of the United States.

COROLLARY:

Seventh. Subject to the will of the President (Parson's case, *supra*), the Congress has legislative power to prescribe for the judges of the judicial courts of the District of Columbia a tenure of office "during good behavior," and may prescribe the like tenure for the Federal judges of any other Territory; and Congress may at any time extend to them the same privileges of resignation offered in section 714, Revised Statutes, to judges of courts of the United States; but no judicial court can do that by construction. Congress has reserved to itself that discretionary power. (Judge McCandless' case, 19 Stat., 57, 318.)

III.

The authorities cited by counsel for appellant do not sustain their contention.

This court, in the case of *Downes* v. *Bidwell* (182 U. S., 263), reviewed some authorities which we think have a bearing upon the case at bar. We quote from the opinion of Mr. Justice Brown as follows:

> * * * *Hepburn* v. *Ellzey*, in which this court held that under that clause of the Constitution limiting the jurisdiction of the courts of the United States in controversies between citizens of different States, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States. It was argued that the word "State" in that

connection was used simply to denote a distinct political society.

On this point Chief Justice Marshall said:

> But as the act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution.

In the case of *New Orleans* v. *Winter* (1 Wheat., 91) Chief Justice Marshall said:

> In the case of *Hepburn* v. *Ellzey* this court determined, on mature consideration, that a citizen of the District of Columbia could not maintain a suit in the Circuit Court of the United States. That opinion is still retained. It has been attempted to distinguish a Territory from the District of Columbia; but the court is of opinion that this distinction can not be maintained. They may differ in many respects, but neither of them is a State in the sense in which that term is used in the Constitution. Every reason assigned for the opinion of the court, that a citzen of Columbia was not capable of suing in the courts of the United States, under the judiciary act, is equally applicable to a citizen of a Territory.

* * * * *

In *Jeofroy* v. *Riggs* (133 U. S., 258) the District of Columbia as a political community was held to be one of the States within the meaning of that term as used in a consular convention of February 23, 1853, with France, where it related to the right of Frenchmen to hold, dispose, and inherit property in the same manner as citizens of the United States.

Referring to this decision Mr. Justice Brown said:

> This case may be considered as establishing the principle that in dealing with foreign sovereignties the term "United States" has a broader meaning than when used in the Constitution, and includes all Territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations this Government is a unit. This is so not because the Territories comprised a part of the Government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the Territories, as well as of the States, in their foreign relations.

The court in summing up the Downes case, among other conclusions, announced the following:

> That the District of Columbia and the Territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States.
>
> That the District of Columbia and the Territories are States as that word is used in treaties with foreign powers with respect to the ownership, disposition, and inheritance of property.

> That the Territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish.

Thus it will be observed that the District of Columbia and the Territories are regarded as being on the same footing, within the judicial clause of the Constitution as it relates to cases between citizens of different States. And the District of Columbia and the Territories are treated as States, in that the provisions of the Constitution relating to the protection of life, liberty, and property extend to all persons within the territorial limits of the United States, whether those limits be embraced in Territories or States.

It is likewise to be observed that the Territories not being within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to ordain and establish, and the District of Columbia not being within that clause of the Constitution giving jurisdiction in cases between citizens of different States, it must follow as a logical conclusion that the courts of the District of Columbia are not organized within the provisions of section 1, Article III, of the Constitution, but of section 2, Article IV, or section 8, clause 17, Article I, of the Constitution.

In the cases of *Page* v. *Burnstine* (102 U. S., 664) and *Good* v. *Martin* (95 U. S., 90), cited by counsel for appellant, it is nowhere held that the courts of the District of Columbia are courts of the United States under the Constitution. While it is held that

the general laws of the United States in relation to the competency of witnesses in courts of the United States are applicable to the courts of the District of Columbia and are inapplicable in the Territories, yet this distinction does not turn upon the character of the courts, but upon the source of the legislation. The "general law" cited (R. S. 858) was held not applicable to the Territorial courts, because the Territories have legislatures empowered to enact laws relating to the competency of witnesses, while Congress not only enacts such laws for the United States, but likewise for the District of Columbia. Hence the enactments of Congress in relation to the practice in the courts of the United States would have force and effect in the District of Columbia, but not in a Territory, if repugnant to the Territorial law. The distinction made between Territorial courts and the courts of the District of Columbia is clearly set forth in *Page* v. *Burnstine* (*supra*), at page 668, where the court said:

> These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the general statutes of the United States relating to the practice and proceedings in the "courts of the United States" are locally inapplicable to Territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the general stat-

utes of the United States referred. It was, therefore, ruled that the Territorial enactments regulating the practice and proceedings of Territorial courts were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to "courts of the United States."

Benson v. *Hinkel* (198 U. S., 1), cited by counsel, refers to the extradition, under section 1014 of the Revised Statutes, of a person charged with an offense against the United States from the district in which he may be found to the district wherein the offense is alleged to have been committed. This section was held to apply to the District of Columbia, and the case has not even a remote bearing upon any question in the case at bar as a judicial decision. It applies likewise to all Territories of the United States. It is a general provision in criminal procedure applying equally between the States and Territories. True, as contended by counsel in the case of *Kendall* v. *The United States* (12 Pet., 524), the Circuit Court of the District of Columbia is referred to as the Circuit Court of the United States for the District of Columbia. So would like reference be properly made by this court to-day in a case appealed from the Circuit Court of the United States for the Eastern or Western District of the Indian Territory or the District of Porto Rico or Hawaii. We do not apprehend that anyone would contend for a moment that simply because these territorial courts are sometimes called circuit courts of the United States as in *Embry*

v. *Palmer* (*ante*), they would be held to be courts of the United States under Article III of the Constitution.

In the Code of the District of Columbia it is declared by section 61, that the Supreme Court of the District—

> * * * shall possess the same powers and exercise the same jurisdiction as the Circuit and District Courts of the United States, and shall be deemed a court of the United States.

Of course that section well illustrated what we have before stated, that—

> It has always been the plain intent of Congress as far as practicable to place the people of the District of Columbia and the people of the organized territories on an equality in the enjoyment of judicial privileges with people of the States.

In *American Insurance Company* v. *Canter* (1 Pet., 511), cited by counsel, the statement of the Chief Justice to the effect that the fact that judges held office for four years in the Territories is conclusive proof that such offices were not created under the constitutional clause according to which judges must have life tenure, is taken by counsel to imply that the judicial tenure fixed by Congress is decisive as making the courts of the District of Columbia courts of the United States, under Article III of the Constitution. While it is true that the fixing of the tenure of office of a judge at four years is a conclusive declaration by Congress that the court is not an inferior court under Article III of the Constitution, the converse is by no means true, that

legislative tenure "during good behavior" is conclusive proof that the court is organized under Article III of the Constitution. As before stated, this is a mere legislative declaration of the tenure of office. Congress could, with equal propriety, declare a life tenure in the courts of the Territories, as it did in the organization of the Northwest Territory and the Territory of Wisconsin. (1 Stat., 50; 5 Stat., 13.)

In *Downes* v. *Bidwell* (182 U. S., 244), it is conceded by all the judges that Congress has the constitutional power to govern the Territories. Defining the distinction between Territorial courts and United States courts, Mr. Justice Brown, delivering the opinion of the court, said, reviewing Chief Justice Marshall's opinion in *American Insurance Co.* v. *Canter* and later cases:

> Certainly no such courts could be created within a State excepting under the judicial clause [meaning Article III, section 1]. (Ib., 267.) * * * The power of Congress over the Territories of the United States is general and plenary arising from * * * the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States (ib., 268).

Accepting this decision as sound constitutional law, it follows, beyond any logical doubt, that the power of Congress over the District of Columbia is just as general and plenary as the power to make "all needful rules and regulations respecting the territory or other property belonging to the United States."

If any logician can see any distinction between that power and the power to "exercise exclusive jurisdiction in all cases whatsoever over such district (not exceeding 10 miles square) as may by cession of particular States and the acceptance by Congress become the seat of government of the United States," he ought, if a lawyer, to be of counsel for appellant in this case; he might, perhaps, be able to demonstrate (what this court has decided to be impossible) that a court of the United States can be established under Article III, section 1, *somewhere else than in one of the United States.*

In all the decisions affecting the Territories, we find the District of Columbia classified as a Territory, and in the very decision last cited (*Downes* v. *Bidwell*) we find, in respect to judicial jurisdiction, the District of Columbia classified with the Territories as deriving judicial power not from Article III, section 1, but from Article IV, section 3, clause 2, or Article I, section 8, clause 17. It is nowhere *held* in any reported case that a Territorial court is a court of the United States (ib., 364) nor that a court established by Congress for the District of Columbia is a United States court. The functions of judges of United States courts are a part of the judicial power of the United States. The United States courts can not exercise any jurisdiction of any cause unless it is granted pursuant to Article III. From what source do the courts of the District of Columbia derive their jurisdiction? Not from that article—much of it is assimilated to United States judicial jurisdiction, but

most of it is conferred by Congress in its exercise of the power to legislate for a Territory as a State does for a county, and Congress could not confer any such State jurisdiction upon any United States court. (*Downes* v. *Bidwell*, 182 U.S., 267; *De Lima* v. *Bidwell*, ib., 196, citing *National Bank* v. *County of Yankton*, 101 U.S., 129.)

CONCLUSION.

The term "courts of the United States," as used in the opinions of this court, refers generally to Federal courts organized under the provisions of section 1, Article III, of the Constitution.

Territorial courts are organized by Congress under the general authority of clause 2, section 2 of Article IV of the Constitution, to establish rules and regulations for the government of the Territories. Congress, by another provision of the Constitution, was vested with full authority to prescribe the government of the Territories, and by Article I, section 8, clause 17, to exercise exclusive legislation over the seat of government. Acting within this authority, a judicial system has been provided for the organized Territories and the District of Columbia. It is not essential that that system should be perfectly uniform. The matter of the tenure of office of the judges is entirely within the discretion of Congress. It may prescribe in one Territory that the tenure of the office of judges shall be for four years; in another six, and in another, as was done in the organization of the Northwest Territory and the Territory of Columbia and the Territory of Wisconsin, "during good behavior."

Hence the mere fact that the tenure of office of the judges of the Supreme Court of the District of Columbia is during good behavior has nothing to do with a determination of the question whether or not that court is a court of the United States, within the provisions of section 1 of Article III of the Constitution, or whether or not its judges are within the provisions of section 714 of the Revised Statutes.

It is contended, however, that the District of Columbia can not be treated as a Territory of the United States, because it originally belonged to the sovereign States of Virginia and Maryland, and having been once under the Constitution as parts of those States it could never be divested of any rights so acquired. We think there will be no contention as to the fact that the Constitution of the United States was adopted primarily as the organic law of the Thirteen original States constituting the Union, and for such other States as might thereafter be admitted into the Union upon a common and equal footing with the original States; that it granted to Congress "the power to exercise exclusive legislation in all cases whatsoever over such District [not exceeding ten miles square] as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States;" that in its general provisions it did not apply to or extend over territory belonging to or ceded to the United States, excepting its fundamental principles for the protection of the life, liberty, and property of citizens of the United States; the right of trial by jury, and certain other rights

guaranteed to every citizen within the territorial limits of the United States, whether the government there existing be that of a sovereign State or of a Territory. But these fundamental rights can be as well protected, and due process of law as well afforded, by courts organized by Congress as part of the machinery for the government of Territories as by courts organized under section 1 of Article III of the Constitution.

Hence it is our contention that even though originally the District of Columbia formed parts of the States of Virginia and Maryland, and the Constitution was thereby extended to and over the inhabitants of that district or territory, yet when the States of Maryland and Virginia ceded that district to the United States they relinquished all sovereignty of every kind or description whatsoever over it. The United States courts operating and having jurisdiction within the States of Maryland and Virginia ceased to exercise any jurisdiction over the District of Columbia. Immediately upon the cessions by these States of parts of their territory for a seat of Government to the United States it became when accepted by Congress a part of the territory of the United States, the government of which was exclusively vested by the Constitution in Congress. The Constitution made special provision for the government of the seat of government. It reserved to Congress absolute and exclusive legislative authority over the seat of government, whenever and wherever it might be located. It, therefore, was provided for by the Constitution

as completely and as distinctly separated from the States as were the Northwest Territory and the Territories that might thereafter be acquired. The entire government of the District—legislative, judicial, and executive—is in the hands of Congress. The courts of the District are the creatures of Congress. The judges of the District are subject to the legislative will of Congress, and are appointed by the President under Article II, section 2, clause 2 of the Constitution as are the judges of other organized Territories. What is the District of Columbia? It is not a part of the United States within the meaning of the Constitution relating to the Thirteen original States and the States that have since been admitted into the Union upon a common footing with them; it formed no part of the national compact that framed and adopted the Constitution as the organic law of the Union of the States; it has no representation; it is accorded no voice in the affairs of the Government; its citizens have no political suffrage in the choice of legislative and executive officers of the Government; it is simply a permanently organized Territory of the United States.

It is contended by counsel for appellant that because the Supreme Court of the District of Columbia has conferred upon it by Congress the jurisdiction of a circuit court of the United States it is therefore a court organized under the provisions of section 1, Article III, of the Constitution. It is true that that court has the jurisdiction of a circuit court of the United States, but it is only *assimilated jurisdiction*,

so have the territorial courts of New Mexico and Oklahoma and Porto Rico like jurisdiction. This is but a convenient way of declaring the jurisdiction of the Supreme Court of the District of Columbia and the like courts for the other Territories. Congress has treated the District of Columbia as a Territory of the United States, and as nearly as possible as a State in order to secure to its inhabitants the fundamental rights and privileges of a republican form of government. From time to time Congress has extended the Constitution to the territory of the United States as the same has been acquired. It was extended by act of Congress to the territory north of the Ohio; it was extended by act of Congress to the territory acquired by the Louisiana purchase; it has been extended by act of Congress to the Territories from time to time, until finally it is codified into a general provision of the Revised Statutes, which is as follows:

> SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

It was unnecessarily extended to the District of Columbia by the act of Congress of February 21, 1871 (16 Stat., 419, 426, sec. 34).

It may be observed here that this act provided a new form of government by giving the District an

executive and legislative branch, and, moreover, it is noticeable that the Forty-first Congress expressly recognized the Territorial status of the District by enacting:

> SEC. 25. That the judicial courts of said District shall remain as now organized until abolished or changed by act of Congress.

This in the same act that extended the Constitution to the District.

It follows from the foregoing that the matter of the salary and tenure of office of the judges of the courts of the District of Columbia being entirely subject to the legislative will, Congress could increase or diminish the salary of Judge James from time to time as it saw fit. We submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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